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No. 577

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In the Supreme Court of the United States

OCTOBER TERM, 1968

JOSEPH PAUL GLIMCO and LENA GLIMCO, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The question in this case is whether petitioner Joseph Paul Glimco[1] is entitled to deduct from gross income, as ordinary and necessary business expenses under Section 162(a) of the Internal Revenue Code of 1954, legal fees incurred in connection with his successful defense against federal criminal charges of extortion.

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[1] Lena Glimco is a party to these proceedings only by reason of the filing of joint tax returns with her husband (Pet. App. 1a).

During the tax years in question (1954 through 1957) petitioner was employed as assistant business manager of the Taxicab Drivers, Maintenance and Garage Helpers Union, Local 777 (hereinafter referred to as Local 777), in Chicago. From 1950 to 1958 he was a trustee of Local 777 and *ex officio* a member of Joint Teamsters Council No. 25, the policy making organization for over 40 Teamster locals in the Chicago area. He had no labor organization affiliations during these years other than Local 777 and the Joint Council. (R. 91-92; Pet. App. 2a.) In 1954, petitioner was indicted by a federal grand jury on charges of conspiring to obstruct the movement of live poultry in interstate commerce by the use of extortion and actual or threatened violence in violation of the Hobbs or Anti-Racketeering Act (18 U.S.C. 1951). (R. 92; Pet. App. 2a.) These charges arose from petitioner's activities on the poultry market in Chicago, where it had been his practice to spend his afternoons after completing his work during the mornings at the offices of Local 777. At a meeting of the membership of Local 777 in October 1954, shortly after petitioner's indictment, the Local was authorized to pay petitioner's legal fees and expenses in connection with the criminal proceedings. In March 1957, petitioner was acquitted of the extortion charges following a jury trial. (Pet. App. 2a-3a.)

The Commissioner of Internal Revenue determined that the amounts paid by Local 777 directly to petitioner's lawyers, which totalled $124,621.45 over four taxable years (R. 95), were income to petitioner, and that petitioner was not entitled to deduct these

amounts as ordinary and necessary business expenses. In petitioner's suit for redetermination, the Tax Court sustained the Commissioner's position (R. 91-98). The court of appeals affirmed (Pet. App. 1a-6a).[2]

The decision below is correct and raises no conflict with other decisions. There is no basis for further review.

1. Whether petitioner incurred the disputed legal expenses in connection with a "trade or business" within the meaning of Section 162(a) is a question of fact. *Higgins* v. *Commissioner*, 312 U.S. 212, 217-218. That question was decided adversely to petitioner by the Tax Court and the court of appeals and thus ought not be reviewed by this Court in the absence of obvious and exceptional error. *Corn Products Refining Co.* v. *Commissioner*, 350 U.S. 46, 51; *Berenyi* v. *District Director*, 385 U.S. 630, 635.

The Tax Court found that the petitioner had no business activity other than that of officer-employee of Local 777, excepting a connection with a phonograph distributing company not pertinent here (R. 97-98), and that his activities at the poultry market "were carried on by him * * * as a 'labor boss' who had influence with the Teamsters Union" (R. 98).

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[2] In the Tax Court, petitioner's ~~the taxpayer's~~ primary contention was that the legal expenses paid on his behalf by Local 777 constituted a nontaxable gift to him. The Tax Court found that Local 777 did not have a donative intent, but made the payments for its own benefit. (R. 96-97.) In the court of appeals, ~~the taxpayer~~ petitioner abandoned his "gift" contention, and contended only that the amounts in question were deductible as business expenses. (Pet. App. 3a.)

The court further held *(ibid.)*:

> We cannot find from any evidence before us that the latter [poultry market] activities had any bearing upon petitioner's duties as an officer-employee of local 777 which was a union representing the interests of taxicab operators. We also have no evidence which indicates petitioner at any time acted as "labor boss" with any idea in mind of being compensated for such activities. * * *

The findings were sustained by the court of appeals, which observed (Pet. App. 4a), "This record is devoid of any showing that Taxpayer conducted his poultry market afternoon activities in order to produce any income or profit", and further that *(ibid.)* "he reported no taxable income from his poultry market activities and testified that he did not recall having received any such income * * *."

Petitioner never directly contends that these findings are so lacking in support as to warrant a second appellate review. His assertions to this Court (Pet. 16) simply represent an attempt to reargue a question of fact that was decided adversely to him below by reiterating the evidence he considers favorable to his position, without referring to the other aspects of the record that amply support the findings.

2. Contrary to petitioner's contentions, this Court's decision in *United States* v. *Gilmore*, 372 U.S. 39, supports the decision below, and *Commissioner* v. *Tellier*, 383 U.S. 687, rests on a record that materially differs from the evidence in this case. *Gilmore*, of course, holds that deductibility of litigation costs depends on whether the litigation arose in connection

with the taxpayer's profit-seeking activities. In *Gilmore* the Court denied deductions for legal fees incurred by the taxpayer in defending against claims of his wife in divorce proceedings regarding the division of their community property. The issue arose under what is now Section 212 of the 1954 Code (Section 23(a)(2) of the 1939 Code), which allows deductions for expenses incurred "for the production or collection of income" or for "the management, conservation, or maintenance of property held for the production of income." The Court observed that Section 212 deductions are akin to Section 162(a) deductions (Section 23(a)(1) of the 1939 Code) in that both sections require that the expenses have business or profit-seeking origins and also that the prohibition of Section 262 (Section 24(a)(1) of the 1939 Code) against deductions for "personal, living, or family expenses" overlays both sections. 372 U.S. at 44. Thus the deduction in *Gilmore* was denied because the origin of the litigation expense was the taxpayer's marital relationship and not his business or profit-seeking activities, even though the wife's claim went against the taxpayer's holdings in closely held corporations from which the taxpayer derived almost all his income. In the present case the deduction was similarly denied because petitioner failed to show that the criminal charges arose from activities which related to his business as officer of the taxicab local or were activities otherwise intended to produce a business profit to himself or to others. Cf. *Putnam* v. *Commissioner*, 352 U.S. 82.[3]

[3] The courts have uniformly held that the profit motive is the single most significant characteristic that distinguishes a

Commissioner v. *Tellier*, *supra*, is not to the contrary. There the Commissioner conceded the business origin of the activities which gave rise to criminal charges against the taxpayer and his concomitant legal expenses (383 U.S. at 689). The issue in *Tellier*, which was not a basis for the Commissioner's determination in the present case, was whether the Commissioner could deny the deduction for the taxpayer's litigation expenses on grounds of public policy, notwithstanding the Commissioner's concession that the expenses related to the taxpayer's business and were ordinary and necessary within the meaning of Section 162(a) (*id.* at 690). The Court's holding that public policy considerations are not a proper basis for the disallowance of deductions otherwise allowed by Section 162(a) hardly absolves petitioner here from having to prove the business or profit-seeking origins of his activities on the poultry market.[4]

3. The propriety of Local 777 undertaking to pay petitioner's legal fees was not in issue in this case and

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"trade or business" under Section 162(a) from personal, nonbusiness endeavors. See *International Trading Co.* v. *Commissioner*, 275 F. 2d 578 (C.A. 7); *Wiles* v. *United States*, 312 F. 2d 574 (C.A. 10); *Lamont* v. *Commissioner*, 339 F. 2d 377 (C.A. 2); *Hirsch* v. *Commissioner*, 315 F. 2d 731 (C.A. 9); *White* v. *Commissioner*, 227 F. 2d 779 (C.A. 6); *Dyer* v. *Commissioner*, 352 F. 2d 948 (C.A. 8); *Wilson* v. *United States*, 376 F. 2d 280 (Ct. Cl.).

[4] Petitioner testified that he fell heir to the position of (R. 52) "czar" or "boss of the market", meaning the produce market in Chicago, after the death of the previous "czar", one William J. Hanley (R. 61). While he testified that in his capacity as czar he (R. 61) "consulted" with labor officials about affairs within the market and (*ibid.*) "around the city or each county", he did not suggest to what end, or in whose behalf, the consultations took place.

is irrelevant to a determination of petitioner's right to deduct the legal fees himself (see Pet. 17-18). Those payments were treated as income to petitioner from his employer (Pet. App. 3a; R. 96-97), and petitioner does not challenge that treatment here. The deductibility by an employer of amounts paid as compensation to an employee has no bearing on the deductibility by the employee of his disposition of that compensation. Otherwise the absorption by an employer of any personal expense of an employee, while constituting income to the employee, would be a deductible expense for the employee simply because its cost was a deductible expense for the employer. That result would render meaningless the prohibition of Section 262(a) against the deductibility of personal expenses.[5]

4. Petitioner cannot obtain a deduction (see Pet. 17) because federal law now bars from union office persons convicted of a variety of felonies, including extortion. This provision, adopted as Section 504 of the Labor-Management Reporting and Disclosure Act,

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[5] The proceedings involving Local 777 were settled prior to trial in the Tax Court (Pet. App. 5a). The basic issue was the exempt status of Local 777 which, once settled (R. 79-80), rendered moot any dispute regarding deductions because the exemption entirely absolved the local from income tax liability. See Sections 501(a) and 501(c)(3), Internal Revenue Code of 1954. Moreover, the Commissioner's settlement of one Tax Court case prior to litigation does not estop him from litigating the same issue with respect to the same taxpayer in later years. *United States* v. *International Building Co.*, 345 U.S. 502. *A fortiori*, no estoppel applies with respect to a different taxpayer.

29 U.S.C. 504(a),* also bars from union office persons convicted of robbery, burglary, arson, murder, rape and assault, among other crimes. Petitioner's rationale would permit union officers to deduct legal expenses in connection with all such criminal charges, irrespective of the relationship between the charges and their union duties, simply because Section 504 bars them from holding office upon conviction. The incidental impact of Section 504 following conviction of a union official of one of the enumerated crimes is indistinguishable from the practical effect on any accused's business affairs upon conviction of a felony followed by a jail sentence. As often as not upon such conviction one must forego his income-producing pursuits, or at least see them suffer a significant deleterious effect. That effect, real as it may be, does not by itself change the character of the crime from personal to business-related.

At all events, even if petitioner's legal theory were sound, it would be of no avail to him. The tax consequences must be assessed according to the state of affairs that existed when the legal expenses were incurred. Cf. *Commissioner* v. *Gordon*, 391 U.S. 83, 96. At that time Section 504 did not exist; the LMRDA was not enacted until 1959, more than two years after petitioner's acquittal. The fact that Section 504(c) applies to convictions obtained before 1959 cannot operate to change the tax consequences of expenditures made in prior years.

5. This case raises no question of discrimination between indigent defendants whose legal expenses are

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* P. L. 86-257, 73 Stat. 536.

borne by the public through court-appointed counsel and persons who bear the cost of their own defense, as petitioner maintains (see Pet. 19-22). Expenses of defending against charges such as those against petitioner are inherently "personal" within the meaning of Section 262. Indigents are provided with counsel to implement the public interest in the enforcement of the Sixth Amendment; they do not thereby become business expenses to the indigent, and, in all probability, these are not expenses that the indigent would otherwise incur. Petitioner is not being treated in a manner that discriminates against him; it is the indigents who have neither an employer who would pay for their counsel nor other significant means who are being brought into a state of equality with petitioner.[7]

[7] The reference in *Tellier* v. *Commissioner*, 342 F. 2d 690, 696 (C.A. 2), affirmed, 383 U.S. 687, to the situation of indigent defendants is not relevant to petitioner's contention. There, in a concurring opinion, Chief Judge Lumbard merely noted that consideration of the *success* of one's legal defense against criminal charges for purposes of the deductibility of such expenses conflicts with the policy that requires reimbursement of expenses to counsel for indigent defendants irrespective of the success of the defense.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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